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Terror and Beyond: Moral and Normative Dilemmas

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Law, Ethics, and the War on Terror. By Matthew Evangelista. Malden, MA: Polity Press, 2008. 202 pp., \$19.95 paperback (ISBN-13: 978-0-7456-4109-6).

Terrorism and Counter-Terrorism: Ethics and Liberal Democracy. By Seumas Miller. Malden, MA: Wiley-Blackwell Publishing, 2009. 222 pp., \$27.95 paperback (ISBN-13: 978-1-4051-3943-4).

[754] The books under review join the debate on the acceptable extent of interference with human rights in the pursuit of political and military objectives. Their respective scopes of analysis are, however, ostensibly different. *Law, Ethics and the War on Terror* by Matthew Evangelista explores the legal and ethical dilemmas of counter-terrorism, and it focuses on controversial developments in international law prompted by state practice rather than by moral concepts. *Terrorism and Counter-Terrorism. Ethics and Liberal Democracy* by Seumas Miller offers an ethical-philosophical analysis of the permissible boundaries of organized political violence, whether terrorism or counter-terrorism.

Evangelista discusses whether state behavior (for example, treatment of terrorist suspects/civilians in conflict zones) can generate new, less protective international human rights norms (chapter 1). The author argues that the war on terror has led to setbacks in many areas in which the efforts of the transnational civil society had fostered human-rights enhancing norms (for example, the ban on certain weapons or methods of warfare such as antipersonnel mines, the stigmatization and prohibition of torture, the prosecution of individuals for mass atrocities). He suggests, nevertheless, that widespread reactions might lead to further restrictions on states' discretion.

Miller enquires whether there are circumstances in which the use of lethal force against non-combatants for political causes can be morally justified, and the infringement upon civil liberties to protect citizens against terrorist attacks can be deemed acceptable. Miller examines high-profile terrorist campaigns and emphasizes the differences between them, for example, action maximizing the loss of innocent life (Al-Qaeda) versus action seeking to discriminate amongst targets (African National Congress' struggle against the apartheid state of South Africa) (chapter 1, "The varieties of terrorism"). The author maintains that effective counter-terrorism might require political solutions in addition to military and policing measures, because sometimes terrorism stems from legitimate grievances.

Both authors address the problem of defining terrorism, albeit from different perspectives. While Evangelista demonstrates that state abuses justified as counter-terrorism are enabled by the lack of an international consensus on a definition, Miller illustrates how existing definitions do not properly reflect the moral distinction between terrorist and non-terrorist acts.

[755] Many scholars acknowledge the importance of a worldwide agreement on the meaning of terrorism, and warn against the vagueness and overbreadth of definitions in current anti-terrorism norms (Weigend 2006:928–929). Evangelista argues that the reversal of human-rights protections partly derives from the absence, in UN anti-terrorism instruments, of a general definition of terrorism providing the basis for collective action, and avoiding terrorist-labeling opportunism (chapter 2). He evokes the debate over the inclusion of state terrorism, characterized as violence perpetrated by state officials domestically against innocent civilians to enforce discipline, deter regime disobedience, or through deliberate attacks against civilian populations during war, in any general definition. He also discusses the status of freedom fighters and challenges the theory that political assassinations (targeted killings of state officials) as a tool against repressive regimes are morally acceptable and do not amount to terrorism. He rejects

the introduction of a judgment value on the justice of the cause in the definition of political assassinations and notes that excluding them from terrorism offenses may encourage state-sponsored assassination of political leaders. He also maintains that, despite the lack of a universal definition, the current normative trend indicates that political motivations no longer suffice to prevent certain acts from being defined as terrorism.

Miller's attempt at a definition of terrorism is premised on some generally undisputed elements: violent action aimed at changing the behavior of some social/political group, in order to further political/military goals, and relying on publicity to cause widespread fear in the targeted group (chapter 2). For the author, the contentious elements are the target of such violence and the methods employed. He uses examples to test existing definitions of terrorism focused on either the innocent or non-combatant status of victims, and he concludes that they are unable to account for certain (state or non-state) terrorist patterns, or to exclude organized political violence not amounting to terrorism. He offers a negative definition of targets: whoever is not a military combatant, human rights violator, or revolutionary. He argues that methods, to be considered terrorist, must constitute human-rights violations in the specific context (wartime, well-ordered society or state of emergency), and could be inferred from domestic and international criminal norms on violent actions, which express the moral agreement on the unacceptability of certain acts. Inquiring whether there are morally justifiable forms of terrorism, Miller rejects specious arguments such as the "collective moral responsibility" for the injustices terrorists seek to redress; however, he argues it might be morally justified to use lethal force against civilians responsible for human-rights violations (for example, those engaged in a war of conquest, ethnic cleansing), or for certain omissions (for example, failure to dispense available medicines/enforce subsistence rights), albeit under limited circumstances (chapter 3). For Miller, killing non-violent rights violators to restore rights should either not be criminalized and considered terrorism, because non-violent rights violators forfeit civilian immunity, or alternatively be deemed as morally justified terrorism. This position underpins arguments that definitions of terrorism cannot be isolated from moral judgments about what constitutes justifiable violence (Thackrah 2004:75–77).

Both authors also examine counter-terrorism as war. Evangelista uses U.S. counter-terrorism policy to illustrate the abuses stemming from the rhetoric and logic of the war against terror. He stresses that, following the Bush administration's characterization of the attacks of September 11, 2001 as acts of war, criminal justice was replaced by targeted killings in states harboring terrorists, extraordinary renditions, torturous interrogation methods, secret detention facilities abroad, and trials by special military commissions rather than regularly constituted courts affording all judicial guarantees (chapter 3). He discusses high profile human-rights violations, such as the treatment of Guantanamo prisoners [756] violating the 1949 Geneva Conventions. The author considers other troubling legal developments, such as the possible emergence of a norm allowing preventive war (chapter 4). While some advocate "anticipatory self-defense" as the only effective means against non-state actors reluctant to negotiation (Howard 2009), the author argues that a norm permitting preventive war would have dire consequences for human rights. He maintains that, despite the worldwide opposition to the war in Iraq and UN refusal to endorse it, the conflation sought by the U.S. administration between preemption (war directed against imminent attack) and prevention (war motivated by merely potential threats) might be propelled by the ambiguous reactions of the international community. He notes, however, that states' behavior is not sufficient for the formation of custom, which also requires the conviction that practice responds to a legal obligation, rather than being an exceptional departure from the rule. He also considers whether regime change is an admissible goal in waging war on terror. Evangelista views it as problematic insofar as, under international law, military occupation should not impede the return to the status quo ante (chapter 5). The author also focuses on the paradox of humanitarian intervention: while it presupposes sympathy for the civilian populations at stake, intervening states attempt to minimize losses among their own soldiers at the expense of greater risks for foreign civilians

through subcontracting local forces, employing private military corporations difficult to hold accountable, aerial bombardment causing mass-casualties, and destruction of infrastructure constituting dual-use targets.

Miller takes the view that, in a war-like situation, terrorist-combatants are unlawful combatants whose methods breach the laws of war, hence they are war criminals rather than ordinary criminals. For Miller, policies such as shoot-on-sight and targeted assassinations of known terrorists can be morally justified in de facto theatres of war, but under strict conditions: treating terrorism as a crime cannot contain the ongoing attacks while treating it as war is likely to do so; they are proportionate to the terrorist threat, and applied only with respect to the specific area concerned and over the necessary timespan; the overall and security consequences brought about are better than competing strategies (chapter 5). Even then, he argues, fundamental moral principles on human rights must be observed (for example, innocent non-citizens cannot be sacrificed to save own citizens, especially if combatants). Miller also examines the moral challenge posed by research in biological sciences, in particular the potential use of genetic engineering techniques to launch bioterrorist attacks (chapter 7). He argues that, notwithstanding the risks that scientific developments become increasingly available to terrorists, research should be allowed to continue, for two reasons: existing information is already a risk to security, and scientific advances can provide solutions against viruses used as weapons of mass destruction. He suggests, however, that greater levels of security and strict regulation of the procedures are needed for research institutions.

It has been noted that the misleading overuse of the term “war” in the anti-terrorism context affects the protection of human rights (Duffy 2005:339–340). Both Evangelista and Miller stress the importance of distinguishing the context in which counter-terrorism takes place (peacetime, state of emergency, war), as it shapes what constitutes a legitimate response to terrorist acts. Evangelista emphasizes the constitutional implications of post-2001 legislation: it centralizes powers in the hands of executives, restrains civil liberties (for example, surveillance of citizens), especially under catch-all UN Security Council anti-terrorism resolutions. He argues that the emergence of more permissive customary laws would signal a regress for human rights, and that the eradication of terrorism is better helped by the adherence to human-rights standards.

Drawing on the same distinction between terrorism as criminal behavior and terrorism as act of war, Miller underscores that some terrorist acts, committed [757] outside a war context, are almost ordinary crimes, for which perpetrators should be investigated, tried and punished (chapter 4). However, he argues, unlike ordinary crimes, terrorist actions are more destabilizing to law and order: they presuppose recurrent patterns, instilling fear, and ultimately an attack on the state itself, as they pursue political or military goals. Hence the permissibility of some interference with the rights and freedoms of the citizenry in a liberal state (free speech, privacy etc.). He stresses that the increased police authority should, nonetheless, be accompanied by clearly defined limits and accountability, and that no trade-off should be allowed between the right to life of a few, and the theoretical rights of others. According to the author, to be morally justified, a law permitting institutionalized practices that encroach upon human rights must meet higher requirements than a one-off action (which might be morally justified in a certain context, albeit it is not and ought not be legal). He also concedes that infringements on citizens’ right to life and freedom (shooting-on-sight, indefinite detention without trial) are not acceptable in a context falling short of war. A third context, between well-ordered peaceful situations and war, is the state of emergency, entailing rights restrictions; for Miller such a state is justifiable, provided that it is legally circumscribed, i.e. precise powers are conferred upon governmental agencies, and rules on termination of those powers are established, as well as judicial oversight on their exercise. As Miller suggests, the conceptual confusion between peacetime, state of emergency and war conditions blurs the distinctions of what is appropriate for police authorities and what is not.

Both authors give special emphasis to the sensitive issue of the use of torture to prevent terrorist attacks. They embrace slightly different positions: Evangelista advocates for absolute prohibition, whereas Miller contends that it should be permitted exceptionally, contingent upon very strict criteria, but not institution-

alized.

Evangelista recalls the moral and pragmatic arguments for opposition to torture such as no exceptional justifications for torturing a human being, inefficient tool in obtaining reliable information/deterring crimes, possible torture of innocents, negative precedent (chapter 3). The author argues that, by torturing detainees, the United States clearly violated unquestionable legal and moral principles, and thus its practice is unlikely to evolve into a new custom, although it has been emulated by other states. However, the author believes that the ambiguous U.S. and international reactions to torture and extraordinary renditions have debilitated the stigma previously attached to it by the efforts of human-rights activists.

Conversely, Miller argues that torture of known terrorists might be morally justifiable under extreme circumstances: the police know they are in the process of completing their action (for example, detonate a nuclear device), they refuse to provide the information necessary to impede it (defuse the bomb), and torturing them is necessary and sufficient to save innocent people (chapter 6). The author thus addresses the “ticking bomb” scenario, which others have challenged on various grounds: the unrealistically high level of certainty required, the ineffectiveness of it in eliciting information, and the moral compromise, which may create precedent (Joseph 2007). However, Miller maintains that legalization of torture is in no circumstance morally justified, it is unnecessary, and a threat to liberal-democratic institutions.

The books under review provide engaging insights on the topics discussed, though occasionally the solutions suggested actually bring about further dilemmas. Thus, Miller’s distinction between a law and a one-off morally justified action that ought not to be legalized prompts the question of whether policemen acting under such “justifiable” circumstances should still be subject to criminal responsibility. One might also inquire how the exceptional framework for legitimate political assassination, or for torture, based on clear-cut information, would work in practice. Several issues appear unsettled, such as the possibility Evangelista alludes to, that state terrorism may be more appropriately covered by war crimes or crimes against humanity rather than included in a general definition of terrorism. The contrasting reflections the books offer on core aspects of terrorism and counter-terrorism illustrate the continuing legal and moral conundrum.

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